Office-Supreme Court, U.S.
FILED
JUN 2 1981
ALEXANDER L. STEVAS,
CLERK

NOs. 80-1770 & 80-1791

in the Supreme Court of the United States

October Term, 1980

RALPH D. TURLINGTON, individually and in his official capacity as COMMISSIONER OF EDUCATION, STATE OF FLORIDA DEPARTMENT OF EDUCATION, et al.,

Petitioners,

vs.

S-1, a minor, by and through his mother and next friend, P-1, et al.,

Respondents.

JAMES C. EDWARDS, individually and in his official capacity as SUPERINTENDENT OF SCHOOLS, HENDRY COUNTY, FLORIDA, et al.,

Petitioners,

vs.

S-1, a minor, by and through his mother and next friend, P-1, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Michael R. Masinter
Nova University Center
for the Study of Law
3100 S. W. 9th Avenue
Fort Lauderdale, FL 33315
305/522-2300
Of Counsel

Jacob A. Rose
(Counsel of Record)
Florida Rural Legal Services
105 S. Narcissus Ave., Ste. 412
West Palm Beach, FL 33401
305/833-4495
Attorneys for Respondents

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals properly held that the District Court did not abuse its discretion in issuing a preliminary injunction which only (a) requires local school officials to:

(i) Provide appropriate education and related services to seven students classified as mentally retarded who were denied those services for approximately two years due to expulsions where no adequate determinations were made of the connection between their respective handicapping conditions and the alleged misbehavior for which they were expelled.

(ii) Review evaluations, placements, and individualized educational programs of two students not under expulsion orders but who were denied hearings to question the appropriateness of those services;

and (b) requires state education officials to insure that local school officials comply with the preliminary injunction, the Handicapped Act and its implementing regulations.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

STATUTES AND REGULATIONS INVOLVED .. vii

STATEMENT REGARDING JURISDICTION ... 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 7

REASONS FOR DENYING THE WRIT

I

The Judgment of The Court of Appeals Affirming The Entry of A Narrowly Drawn Preliminary Injunction Decides No Important Questions of Federal Law 10

II

There Is No Conflict Between The Decision of The Fifth Circuit And Previous Decisions of This Court Or Other Courts of Appeals 11

TABLE OF CONTENTS (Continued)

Page

III

The Court of Appeals Correctly Found That The District Court Did Not Abuse Its Discretion In Issuing The Preliminary Injunction 12

A. The Court of Appeals correctly reasoned that the Handicapped Act prohibits a denial of educational services to a handicapped student for misconduct without a proper determination that his misconduct is not a manifestation of his handicapping condition . 13

B. Expulsion of a handicapped student constitutes a change in placement within the meaning of the Handicapped Act 14

C. Refusal to convene impartial due process hearings violated the Handicapped Act ... 16

D. The Handicapped Act imposes supervisory responsibilities on state education officials in order to insure local school officials' compliance with its requirements 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases	Page
American Construction Co. v. Jacksonville T & R.R. Co., 148 U.S. 372, 384 (1893)	11
Blue v. New Haven Bd. of Education, Case No: N-81-41 (D. Conn. March 23, 1981)	14
Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974)	7, 10
Doe v. Koeger, 480 F.Supp. 225 (N.D. Ind. 1979)	14
Doe v. Mahre, Case No: C-80-4270-MHP (N.D. Cal. Dec. 12, 1980)	14
Doran v. Salem Inn, Inc., 422 U.S. 916 (1975)	11
Sherry v. New York State Education Department, 479 F.Supp. 1238 (W.D. N.Y. 1979)	14
Southeastern Community College v. Davis, 442 U.S. 317 (1979)	11, 12
Stuart v. Nappi, 443 F.Supp. 1235 (D. Conn. 1978)	14
University of Texas v. Camenisch, 49 U.S.L.W. 4468, 4469 (U.S. April 29, 1981)	7, 11

TABLE OF AUTHORITIES (Continued)

Page

STATUTES

The Education for All Handicapped Children Act of 1975 (The Handicapped Act) ..... vi, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

Section 504 of the Rehabilitation Act of 1973 (Section 504) 2, 6, 11, 12

20 U.S.C. §1401(19) 4

20 U.S.C. §1412 vii

20 U.S.C. §1412(6) viii

20 U.S.C. §1415(b)(2) 3, 4

20 U.S.C. §1415(b)(1)(E) 16

20 U.S.C. §1415(e) 2

28 U.S.C. §1254(1) 2

28 U.S.C. §1291(a)(1) 7

29 U.S.C. §794 (Supp. III 1979) 2

42 U.S.C. §1983 2

Pub. L. 94-142, 89 Stat. 775, Sec. 3(c) 15

TABLE OF AUTHORITIES (Continued)

Page

REGULATIONS

Florida Administrative Code Rule 6A-6.3011(1)(a) . xii

34 C.F.R. part 300 ix

34 C.F.R. §300.340-42 4

34 C.F.R. §§300.532 .533(a)(3) 4, 14

45 C.F.R. part 121a ix

45 C.F.R. §121a.340-42 4

45 C.F.R. §121a.341 6

45 C.F.R. §121a.349 6

45 C.F.R. §121a.503 6

45 C.F.R. §121a.530 5

45 C.F.R. §121a.532 .533(a)(3) 4

45 C.F.R. §121a. 533 6

45 C.F.R. §121a. 534 5

MISCELLANEOUS

120 Cong. Rec. 472, 515 (daily ed. 1974) 15

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulations set forth by petitioners, respondents also rely upon certain provisions of the Education for All Handicapped Children Act of 1975 and its implementing regulations, as well as a published rule of Florida State Board of Education.

United States Code, Title 20

§1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan . . . in order to assure that —

> (A) there is established (i) a goal of providing a full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;
>
> (B) a free appropriate public education will be available for all handicapped children

between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

* * *

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

* * *

Code of Federal Regulations, Title 45, Part 121a.
(renumbered 34 C.F.R. part 300)

Subpart F—State Administration

STATE EDUCATIONAL AGENCY RESPONSIBILITIES: GENERAL

§121a.600 Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring;

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(20 U.S.C. 1412(6))

Comment. The requirement in §121a.600(a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each State. With respect to State educational agency responsibility, the Senate Report on P.L. 94-142 includes the following statements:

This provision is included specifically to assure a single line or responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *.

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Senate Report No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options which may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning State educational agency standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the State educational agency responsibility.

(3) State law, regulation, or policy designates the State educational agency as responsible for establishing standards for all educational programs for the handicapped, and includes responsibility for monitoring.

(4) State law mandates that the State educational agency is responsible for all educational programs.

§121a.601 Monitoring and evaluation activities.

Each State educational agency shall:

(a) Undertake monitoring and evaluation activities to insure compliance of all public agencies within the State with the requirements of Subparts C, D, and E.

Florida Administrative Code
Rule 6A — 6.3011(1) (a)

EDUCABLE MENTALLY RETARDED

One who is mildly impaired in intellectual and adaptive behavior and whose development reflects a reduced rate of learning. The measured intelligence of an educable mentally retarded student generally falls between two (2) and three (3) standard deviations below the mean and the assessed adaptive behavior falls below age and cultural expectations.

Nos. 80-1770 & 80-1791

in the Supreme Court of the United States

October Term, 1980

RALPH D. TURLINGTON, individually and in his official capacity as COMMISSIONER OF EDUCATION, STATE OF FLORIDA, DEPARTMENT OF EDUCATION, et al.,

Petitioners,

vs.

S-1, a minor, by and through his mother and next friend, P-1, et al.,

Respondents.

JAMES C. EDWARDS, individually and in his official capacity as SUPERINTENDENT OF SCHOOLS, HENDRY COUNTY, FLORIDA, et al.,

Petitioners,

vs.

S-1, a minor, by and through his mother and next friend, P-1, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT REGARDING JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on 26 January 1981, affirming the entry of a preliminary injunction in favor of respondents. Rehearing was not sought. Jurisdiction is conferred by 28 U.S.C. §1254(1)

STATEMENT OF THE CASE

(Petitioners, RALPH D. TURLINGTON, *et al*, DOC. NO: 80-1770, will be referred to, unless otherwise specified, as "state education officials"; petitioners, JAMES C. EDWARDS, *et al*, DOC. NO: 80-1791, will be referred to as "local school officials". Reference to Appendix [Ap.] will be to that of petitioners EDWARDS, *et al*. "Respondents" will be used interchangeably with "students".)

At the commencement of the action in District Court respondents were public school students who were classified as educable mentally retarded (EMR).[1] They sued petitioners under the jurisdictional provisions of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1415(e), (hereinafter referred to as the "Handicapped Act") and 42 U.S.C. §1983, seeking to redress violations of, *inter alia*, the Handicapped Act and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (Supp. III, 1979) (hereinafter referred to as "Section 504") and their implementing regulations.

---

[1]As defined, *supra*, at page

Respondents sought preliminary injunctive relief, and are seeking permanent injunctive and declaratory relief and damages. After an evidentiary hearing on respondents' motion for a preliminary injunction, the District Court found that respondents S-1, S-2, S-3, S-4, S-5, S-6 and S-8 had been expelled from the public schools of Hendry County, Florida, for most of the 1977-78 school year and the entire 1978-79 school year, the maximum time permitted by state law, and had received no educational services during that time. The District Court found also that the expelled students consisted of a group, S-2, S-3, S-4, S-5, S-6 and S-8, who were expelled for alleged misconduct, and who were being denied all educational services without any determination of whether the misconduct in question was a manifestation of their handicapping conditions; and a single student, S-1, who was expelled after the local school board, during the expulsion hearing, found that since he was classified as EMR as opposed to "seriously emotionally disturbed" and, therefore, knew the difference between right and wrong, his alleged misconduct could not, as matter of law, have been related to his handicap.

The District Court further found that all of the respondents had sought, without success, hearings under 20 U.S.C. §1415(b)(2) to determine whether they had been properly evaluated, whether they had been properly placed, and whether they were receiving appropriate individualized educational programs as required by the Handicapped Act. The District Court also found that state education officials refused to intercede in these matters, claiming a lack of authority to act.

Based upon these findings, and without reaching the issue of whether an expulsion is ever permissible under the Handicapped Act, the District Court held that there was a substantial probability that respondents would prevail on the merits of their claims that local school officials violated the Handicapped Act by denying them educational services without a determination of whether their misconduct was unrelated to their handicapping conditions.

The District Court further held that there was a substantial probability that respondent S-1 would prevail on his claim that since an expulsion is a change in educational placement, local school officials violated the Handicapped Act by entrusting the required determination to school board members, who lacked the necessary expertise to make that determination, rather than to a knowledgeable, specialized group of persons as required by 45 C.F.R. §§121a.532, .533(a)(3), renumbered as 34 C.F.R. §§300. 532, .533(a)(3).

The District Court also held that there was a substantial probability that respondents would prevail on their claims that they were entitled to educational placements based upon evaluations under 45 C.F.R. §121a.532, renumbered as 34 C.F.R. §300.532, individualized educational programs as described in 20 U.S.C. §1401(19) and 45 C.F.R. 121a.340-42, and hearings to review matters related thereto under 20 U.S.C. §1415(b)(2).

Turning to claims against state education officials, the District Court held that there was a substantial probability that respondents would prevail on their

claim that 20 U.S.C. §1412(6) imposes upon state education officials the responsibility for ensuring that local school officials comply with the Handicapped Act.

Finding that there was a clear probability, based upon substantial evidence (Tr. 62-64, 84-88), that unless enjoined, petitioners would continue to deny respondents their rights under the Handicapped Act, thus irreparably injuring respondents, the District Court entered a preliminary injunction under that Act directing local school officials to:

(a) immediately take affirmative steps to insure plaintiffs S-1, S-2, S-3, S-4, S-5, S-6 and S-8 are placed in a program in the District School System of Hendry County, Florida, wherein they will be provided with a free and appropriate education in the least restrictive environment, in accordance with the requirements of the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.*, and its implementing regulations, 45 C.F.R. Part 121a.;

(b) immediately insure that a review of the evaluations of each of the named plaintiffs is conducted to determine whether they have properly evaluated in accordance with 45 C.F.R. §§121a.530-121a.534, and perform such reevaluations as may be required by 45 C.F.R. §121a.534;

(c) immediately insure that a review of the educational placement of each named

plaintiff is conducted in light of the required evaluations and any independent educational evaluations which plaintiffs have obtained as provided in 45 C.F.R. §121a.503, and make appropriate placements in accordance with 45 C.F.R. §121a.533;

(d) immediately take all necessary steps to insure that an individualized education program for each named plaintiff is developed and implemented in accordance with 45 C.F.R. §§121a.341-121a.349 (Ap. 29a-30a).

The District Court also granted preliminary relief which directed state education officials to insure that local school officials comply with the preliminary injunction, the Handicapped Act and its implementing regulations. The District Court entered no relief under Section 504.

All petitioners appealed from the entry of the preliminary injunction. Respondents did not cross appeal. The Court of Appeals held that the District Court did not abuse its discretion in granting the preliminary injunction, and, accordingly, entered a judgment affirming its entry. Proceedings are continuing in the District Court, and to date, a trial on the merits has not taken place.

SUMMARY OF THE ARGUMENT

The petitions for writ of certiorari contain no issues of substantive or procedural law that should be resolved by this Court. Those issues being urged are prematurely presented because they have not been finally resolved by the courts below.

The sole issue presented to the Court of Appeals, whether the District Court abused its discretion in entering a preliminary injunction, was properly decided by a balancing of the requisite factors listed in *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). Indeed, petitioners have raised no arguments challenging the use of an improper standard by either lower court.

Neither have they raised any arguments in the Court of Appeals or in this Court which represent substantial justification for expanding the well-established scope of review of a preliminary injunction; absent such justification, interlocutory appeals of insignificant injunctive orders will be encouraged and the policies of 28 U.S.C. §1291(a)(1) defeated.

The significant impact ascribed by petitioners to the interpretation of law by the courts below demonstrates a misunderstanding of the precedential value of those interpretations which were made solely for the purposes of determining whether preliminary relief was improvidently granted. Those interpretations would not be binding on the District Court when it eventually reaches the merits of respondents' claims. *University of Texas v. Camenisch*, 49 U.S.L.W. 4468, 4469 (U.S. 29 April 1981).

Respondents clearly demonstrated in the courts below that the Fifth Circuit's standard for the issuance of a preliminary injunction was met. The Handicapped Act requires petitioners to provide a free and appropriate public education to all handicapped children in the State of Florida aged three through eighteen, as of 1 September 1978.

As qualified handicapped children—being within the age limits and regarded as mentally retarded—seven of the respondents were denied all rights under the Act due to two year expulsions. The other two were denied, among other entitlements, impartial due process hearings to challenge alleged violations of the Act by local school officials.

Petitioners admitted that a handicapped student may not be expelled for misconduct which results from the handicap itself. They also admit that, except for one student, they made no determination of the relationship between the expelled students' handicaps and behavioral problems. With regard to that one student, the issue was addressed at a disciplinary proceeding by school board officials who lacked the necessary expertise to make such a determination.

The Court of Appeals was correct, therefore, in deciding that the District Court did not abuse its discretion when it concluded that the students' exclusion for misconduct was impermissible under the Handicapped Act, absent a determination, by an appropriate body, that the misconduct was unrelated to the handicapping conditions.

In regard to the two non-expelled students, they clearly demonstrated entitlement to the preliminary injunction by proving that they were denied statutorily guaranteed impartial due process hearings—rendering them unable to challenge matters regarding their evaluations and individualized education programs.

State officials' refusal to intervene on behalf of the students was unlawful. As recipients of funds under the Handicapped Act, the state educational officials assume ultimate responsibility for ensuring that the requirements of the Act are followed. Thus, the District Court did not abuse its discretion in ordering those officials to ensure that the local school officials comply with the preliminary injunction, the Handicapped Act and its implementing regulations.

REASONS FOR DENYING THE WRIT

I

THE JUDGMENT OF THE COURT OF APPEALS AFFIRMING THE ENTRY OF A NARROWLY DRAWN PRELIMINARY INJUNCTION DECIDES NO IMPORTANT QUESTIONS OF FEDERAL LAW

In the decision below, the Court of Appeals held that under the criteria which govern the issuance of a preliminary injunction in the Fifth Circuit, the District Court did not abuse its discretion in resolving on an interim basis the rights of nine students by merely ordering petitioners to comply with the specific provisions of the Handicapped Act. Under *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974), those criteria are: (1) substantial likelihood that plaintiffs will prevail on the merits; (2) the substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to plaintiffs outweighs the threatened harm the injunction may do to the defendants; and (4) granting the preliminary injunction will not disserve the public interest.[2]

Inevitably, a court of appeals reviewing a grant of preliminary relief under these criteria must review the conclusions of law upon which relief is based. It is

[2]The Court of Appeals confined its discussion to the first two prerequisites because if found that petitioners did not seriously challenge the others. 635 F.2d at 345 n. 5; Ap. 5a.

settled law, however, that in reviewing likelihood of success on the merits, the decision of the Court of Appeals does not finally resolve the merits, but rather determines whether the District Court improvidently exercised its jurisdiction, *University of Texas v. Camenisch*, 49 U.S.L.W. 4468 (U.S. April 29, 1981), *Doran v. Salem Inn, Inc.*, 422 U.S. 916 (1975).

Since neither the District Court nor the Court of Appeals has finally resolved the merits of any question under the Handicapped Act, it would be inappropriate to grant certiorari for the purpose of deciding the questions petitioners pose. Furthermore, as the preliminary injunction by its own terms does no more than require interim compliance with a federal statute, it cannot be said that the writ "is necessary to prevent extraordinary inconvenience and embarassment in the conduct of the cause." *American Construction Co. v. Jacksonville T. & R. R. Co.*, 148 U.S. 372, 384 (1893). Thus, this Court should deny interlocutory review.

II

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE FIFTH CIRCUIT AND PREVIOUS DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS

Notwithstanding state education officials' assertions, the decision of the Court of Appeals does not conflict with *Southeastern Community College v. Davis*, 442 U.S. 317 (1979). *Davis* decided questions arising under Section 504 of the Rehabilitation Act of 1973. Neither the Court of Appeals nor the District Court decided

any question under Section 504, rather, they decided questions solely under the Handicapped Act. As the Fifth Circuit aptly noted:

> (T)he Supreme Court held that Section 504 does not forbid a professional school from imposing physical qualifications for admissions. Without discussing Southeastern any further, it is clear that it does not apply to this case. Furthermore, we do not deal with a professional school (Ap. 15a-16a).
>
> Thus, the asserted conflict is illusory.[3]

III

THE COURT OF APPEALS CORRECTLY FOUND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION

Petitioners have not challenged the propriety of the District Court's reliance on the usual four-factor analysis for considering a motion for preliminary injunction. Apparently they challenge only that court's application of those factors to the facts of this case. Without question, the District Court did not abuse its discretion in issuing the preliminary injunction based upon application of the appropriate standard.

---

[3]While the District Court draws a parallel between Section 504 and the Handicapped Act, and the Court of Appeals discusses Section 504, neither Court drew conclusions under Section 504 to justify either the issuance or affirmance of the preliminary injunction under the Handicapped Act.

A. The Court of Appeals correctly reasoned that the Handicapped Act prohibits a denial of educational services to a handicapped student for misconduct without a proper determination that his misconduct is not a manifestation of his handicapping condition.

It is significant to note how the District Court found that the expelled students demonstrated a substantial likelihood of success on the merits. As justification for denial of all educational services, petitioners argued that the students forfeited their right to a free and appropriate education because of misconduct. They agreed with the District Court's determination, however, that a handicapped student cannot be denied those services for misconduct without a determination that the misconduct is unrelated to the handicapping condition.[4] Petitioners also admit, and the court properly found, that, except as to one student, they did not make the requisite determinations. The undisputed expert testimony before the District Court showed that not only were behavioral deficits inherent in the students' classification as mentally retarded,[5] but also that it was quite probable their handicapping conditions were the cause of behavioral problems (Tr. 100-107, 120).

Petitioners below rested the denial of educational services on the novel proposition that because they

---

[4]"Defendants conceded that a handicapped student cannot be expelled for misconduct which is a manifestation of the handicap itself." Memorandum Opinion of the District Court Ap. 22a.

[5]See definition of educable mentally retarded, *supra*, at page

classified respondents as EMR, as a matter of law, there could be no relationship between respondents' behavior and their respective handicaps. Since neither the Handicapped Act nor common sense offers any support for that proposition, it is not surprising that petitioners have abandoned it.

B. Expulsion of a handicapped student constitutes a change in placement within the meaning the Handicapped Act.

With regard to S-1, the Court of Appeals correctly agreed with the District Court's finding that an impermissible body purportedly determined the connection between his handicap and behavior; this was done by local school board officials at his expulsion hearing. The courts below also correctly determined that an expulsion, i.e., removal of student from placement, is a change in educational placement thereby requiring that evaluations and placement decisions be made by a group that includes persons who are knowledgeable about the child, the meaning of evaluation data and placement options. 34 C.F.R. §§300.533(a). While no other federal appellate court has yet, in a reported decision, addressed this issue, the Court of Appeals' treatment of the underlying issue that an expulsion is a change in placement is in accord with various district courts, *Stuart v. Nappi*, 443 F.Supp. 1235 (D. Conn. 1978); *Sherry v. New York State Education Department*, 479 F.Supp. 1238 (W.D.N.Y. 1979); *Doe v. Koeger*, 480 F.Supp. 225 (N.D. Ind. 1979) all cited by the Fifth Circuit (Ap. 11a.-12a). *See, also, Blue v. New Haven Bd. of Education*, Case No: N-81-41 (D. Conn. March 23, 1981) (order granting preliminary injunction) and *Doe v. Mahre*,

Case No: 80-4270-MHP (N.D. Cal. Dec. 12, 1980) (order granting preliminary injunction).

Petitioners argument that an expulsion is not a change in educational placement is unsound and contrary to decisional law and the clear purpose of the Handicapped Act. Congress, in enacting the Handicapped Act, was emphatic in its statement of purpose, expressed in Sec. 3(c) of Pub. L. 94-142, 89 Stat. 775, that special education and related services must be designed to meet the unique needs of the handicapped student, and that removal from the normal school setting be done in accordance with prescribed procedures under the Act. Thus, placement decisions must comply with the least restrictive environment provisions of 20 U.S.C. §1412(5), which prohibit removal from the normal school environment unless supplementary aids and services prove unsatisfactory.

Congress sought to guarantee a free and appropriate education for handicapped students, and to assure that whenever possible, handicapped students receive their education in the normal school environment.[8] Recognizing that circumstances will in some instances preclude educating a handicapped child in a regular classroom, Congress established change in placement procedures designed to prevent improper removal of regular classroom services. By arguing that expulsion is not a change in placement, petitioners seek to frustrate the expressed intent of Congress and to circumvent the procedures established to give effect to that intent.

[8]*See, e.g.* 120 *Cong. Rec.* 472, 515 (daily ed. 1974) (Remarks of Sen. Stafford) that least restrictive environment is cornerstone of Handicapped Act.

C. Refusal to convene impartial due process hearings violated the Handicapped Act.

Respondents S-7 and S-9, two students who were not expelled, showed a substantial likelihood of success on the merits by establishing that local school officials refused to permit them to challenge matters regarding their evaluations and individualized educational programs in impartial due process hearings under 20 U.S.C. §1415(b)(1)(E). 20 U.S.C. §1415(b)(2) contains no exception to its requirement that petitioners must upon request convene an impartial due process hearing to resolve a complaint pertaining to special educational matters (in this case to challenge the propriety of the evaluation methods, placement decisions, denial of services, and appropriateness of the individualized education programs).

D. The Handicapped Act imposes supervisory responsibilities on state education officials in order to insure local school officials' compliance with its requirements.

The Court of Appeals also correctly concluded that the District Court did not abuse its discretion in requiring state education officials to insure that local school officials comply with the Handicapped Act and its implementing regulations. As a condition for federal funding 20 U.S.C. §1412(6), *supra*, at *p. viii*, places ultimate responsibility on state officials for assuring that all handicapped children receive a free and appropriate education without regard to whether a local school district is administering a program for those children. When the disciplinary proceeding abridged respondents rights under the Act, the state officials' refusal to

intervene, when notified of the violations, was in clear contravention of Handicapped Act (Ap. 17a).

The questions that petitioners pose clearly are not presented by this case. This case involves no sweeping questions of judicial interpretation; rather, it turns upon the routine application of specific federal statutes. Stripped of rhetoric, petitioners argument reduce to the assertion that Congress did not mean what it said when it enacted the Handicapped Act for such legislation unwisely ties the hands of local school officials. In so arguing, petitioners confuse the respective roles of this Court and Congress; ultimately they advance their argument in the wrong forum.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL R. MASINTER
Nova University for
the Study of Law
3100 S.W. 9th Avenue
Fort Lauderdale, FL 33315
(305) 522-2300

Of Counsel

JACOB A. ROSE
(Counsel of Record)
Florida Rural Legal Services
105 South Narcissus Avenue
Citizens Building, Suite 412
West Palm Beach, FL 33401
(305) 833-4495
Attorneys for Respondents